SUPREME COURT, U. S.

Supreme Court, U.S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. ~~1835~~ 70-290

GAS LIGHT COMPANY OF COLUMBUS, *Petitioner*

vs.

GEORGIA POWER COMPANY and
THE SOUTHERN COMPANY, *Respondents*

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

HATCHER, STUBBS, LAND,
HOLLIS & ROTHSCHILD,
ALBERT W. STUBBS,
Empire Building,
Columbus, Georgia 31902,

LAW OFFICES OF JOSEPH L. ALIOTO,
PETER J. DONNICI,
111 Sutter Street, Suite 1421,
San Francisco, California 94104,

LAW OFFICES OF BLECHER & COLLINS,
MAXWELL M. BLECHER,
612 South Flower Street,
Los Angeles, California 90017,
Attorneys for Petitioner.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO, CALIFORNIA

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PRELIMINARY STATEMENT

Respondents Georgia Power Company and The Southern Company have attempted by semantic sleight of hand to obfuscate the importance of the issues raised by the decision of the United States Court of Appeals for the Fifth Circuit, below. The respondents have utterly failed to negate the cogent reasons presented in the petition warranting this Court's review of the case.

Rather than confronting the question of the nature and extent of the *Parker v. Brown* [317 U.S. 341 (1943)] antitrust immunity, and the policies and considerations which limit its application, respondents have contented themselves with meaningless and superficial distinctions between our case and some of those cited in the petition. [See, for example the respondents' unsuccessful attempt to distinguish the decision of the Fifth Circuit herein from *Hecht v. Pro-Football, Inc.*, 1971 CCH Trade Reg. Rept. ¶73,559 (D.C. Cir. 1971), which recognized the limited nature of the *Parker* immunity. (Resp. Brief, pp. 8-10).]

At page 15 of their brief, respondents, perhaps inadvertently, reveal the true danger of the Fifth Circuit's ruling in our case. Respondents concede that in recent decades, state regulation of "businesses affected with the public interest" has proliferated. Most of these regulated industries are supervised by state administrative agencies. Under the decision of the Fifth Circuit, any agency approval of a practice proposed by one of the regulated businesses immunizes that conduct from federal antitrust sanctions even though neither the state legislature nor the regulating agency intended such immunity.

Such an unjustified expansion of the *Parker v. Brown* immunity would seriously weaken the application of federal antitrust policies to anticompetitive practices occurring within these numerous and significant sectors of the economy. The ruling below and the view propounded by the respondents herein is completely inconsistent with rulings recognizing the antitrust laws as "* * * our economic magna carta * * *" [*Woods Exploration & Producing Co., Inc. v. Aluminum Company of America,*

438 F.2d 1286, 1302 (5 Cir. 1971)], as well as this Court's frequent admonitions against assumptions or expansions of antitrust immunity. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 217-218 (1966); *United States v. Philadelphia National Bank,* 374 U.S. 321, 350-351 (1963); *United States v. Pan American Airways,* 371 U.S. 296 (1963).

The issue of the *Parker v. Brown* immunity has, in the past few years, become one of significant importance to the administration of the antitrust laws. The continuing and growing controversy among lower federal courts concerning the nature and extent of that immunity can be resolved only through a definitive decision by this Court. For that reason the present petition for a writ of certiorari must be granted.

ARGUMENT

THE EXISTING CONFLICT AND CONFUSION AMONG THE VARIOUS COURTS OF APPEAL CONCERNING THE NATURE OF THE PARKER v. BROWN IMMUNITY CONTINUES TO EXPAND: NORMAN'S ON-THE-WATERFRONT, INC. v. WHEATLEY, 1971 C.C.H. TRADE REG. REPTS. PAR. 73,606, p. 90,490 (3 CIR. JUNE 17, 1971).

Respondents argue that no conflict exists among the decisions of Courts of Appeals in various circuits concerning the application of the *Parker v. Brown* immunity. Such a position (inherently incredible to anyone who has carefully read the opinions cited in the petition) becomes devoid of the slightest trace of merit after the decision of the Third Circuit Court of Appeals in *Norman's On-the-Waterfront, Inc. v. Wheatley, supra.* In that case, Judge

Adams noted the various conflicting decisions and the minute, and relatively meaningless distinctions upon which recent determinations of immunity *vel non* have been based. The Court in *Norman's* reached the correct result, but for the wrong reason, concluding that the *Parker* immunity was inapplicable because of the nature of the state agency's role in relation to the anticompetitive practice.

Norman's, our case, and many of the recent rulings on this issue reflect the great confusion surrounding the extent of the *Parker* immunity. This confusion has been generated by the failure of many lower federal courts to recognize and apply the underlying policy of the *Parker* ruling.

Parker was obviously not intended to create antitrust immunity for private anticompetitive activity merely because such is approved by the state. 317 U.S. at pp. 350-351. Rather, immunity is created only in those extremely rare situations in which the state deliberately and purposefully interdicts a particular aspect of competition which would interfere with a significant state policy.

In our present case, however, the application of the antitrust laws as here sought by petitioner, Columbus Gas Light, is consistent with and, indeed, in furtherance of the policy of the State of Georgia favoring competition between suppliers of natural gas and suppliers of electricity. To apply the *Parker* immunity to such a case would defeat the purpose of the *Parker* decision itself by simultaneously frustrating the State's policy as well as federal antitrust enforcement. Where, as here, the State's interest is consistent with the federal antitrust laws, there exists no justification or reason for the *Parker* immunity to

arise. See *Woods Exploration & Producing Co., Inc. v. Aluminum Company of America*, 438 F.2d, at p. 1303. Thus, the ruling of the Fifth Circuit below, constitutes a patently erroneous and unwarranted "repeal of the antitrust laws by implication from a regulatory statute." *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-351 (1963).

Respondents ignore these important policy questions and address themselves to factual distinctions which are immaterial to the controlling issues surrounding the *Parker* immunity. Indeed, these superficial, factual "distinctions" merely add to the confusion. For example, respondents' assertion that the decisions in *G. R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1 Cir. 1970), *cert. den.*, 400 U.S. 850 (Oct. 12, 1970), and *Woods Exploration & Producing Co., Inc. v. Aluminum Company of America, supra,* do not conflict with the Fifth Circuit decision in this case when carefully considered, provides yet another persuasive argument for the granting of certiorari by this Court. To suggest, as the respondents do, that the *Whitten* and *Woods* Courts were correct in declining to apply *Parker v. Brown, supra,* because in those cases "the state action had been improperly induced" (Respondents' Brief, page 9), is to emasculate this Court's protection of First Amendment rights articulated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127 (1961). In *Noerr,* this Court, in holding that joint solicitation of governmental action with respect to the passage or enforcement of laws did not offend the Sherman Act, made it perfectly clear that the result was in no way affected by the truth or falsity of

the representations made in the solicitation effort. Noting that the deceptive propaganda used in a publicity campaign to solicit government action "falls far short of the ethical standards generally approved in this country" (365 U.S. at 140), this Court went on to say:

> "* * * But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And *that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned.* That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement." 365 U.S. at 144. (Emphasis added.)

If joint *solicitation* of governmental action is immunized from antitrust action, *even if the solicitation involves the use of false, fraudulent or misleading propaganda,* then it seems utterly preposterous to argue that actual governmental action taken as a result of the solicitation creates antitrust liability. If the First Amendment protects an industry in *seeking* governmental action without respect to the truthfulness of the representations, then antitrust immunity afforded by the *Parker* doctrine cannot be made to depend upon so ephemeral an issue as to whether the government was "improperly induced" by false, fraudulent or misleading representations.

This shows the confusion which permeates respondents' attempt to reconcile the various decisions in the circuits. The *Noerr* immunity is bottomed on the First Amendment; *Parker v. Brown* immunity involves a balancing of the Federal-State relationships. *Parker v. Brown* immunizes

from antitrust attack private conduct directly responsive to the mandate of a state which has made a conscious and deliberate decision that competition within a given industry should be subordinated to a greater governmental objective. The application of this doctrine cannot be made to depend upon whether the state was correct or incorrect in its judgment or whether the state was induced by fraudulent, false, or misleading representations of those who would be affected by its sovereign judgment. In arguing that the *Parker* doctrine applies only where the state is not misled, respondents not only open a Pandora's Box, but create philosophical irreconcilability with First Amendment protection under *Noerr*. Under respondents' theory all "state action" cases predictably will raise fact issues as to whether the state acted upon information which was false, fraudulent or misleading and which thereby induced it to make an "erroneous" judgment.

State action is state action, whether it is "right" or "wrong". The state action which this Court held immunized from antitrust attack in *Parker v. Brown* was a deliberate decision to save an entire industry from the effects of drastic overproduction at the expense of lessening competition. No such decision has been made in this case by the State of Georgia. Indeed, the contrary is true. If routine decisions of any and every state agency rise to the level of immunizing private, anticompetitive practices even if such immunity depends upon a showing that the state was not misled, then *meaningful* antitrust enforcement cannot long endure. For as stated in the petition, every exercise of primary jurisdiction by a state administrative body would carry almost automatic immunity from federal

antitrust sanctions. Certainly this Court did not intend such a result by its ruling in *Parker v. Brown, supra.*

CONCLUSION

The existent confusion and uncertainty concerning the nature and extent of the *Parker v. Brown* immunity from antitrust remedies has been greatly exacerbated by the ruling of the Fifth Circuit below. Lower federal courts have expanded the *Parker* immunity so as to threaten the efficient administration of the federal antitrust laws. A ruling by this Court is necessary in order to clarify the law and to re-establish the original boundaries of the state action immunity.

For the reasons stated above, as more fully stated in the petition previously filed herein, the petition for writ of certiorari should be granted.

Dated, August 5, 1971.

Respectfully submitted

HATCHER, STUBBS, LAND,
HOLLIS & ROTHSCHILD,
ALBERT W. STUBBS,

LAW OFFICES OF JOSEPH L. ALIOTO,
PETER J. DONNICI,

LAW OFFICES OF BLECHER & COLLINS,
MAXWELL M. BLECHER,

By MAXWELL M. BLECHER,
PETER J. DONNICI,
Attorneys for Petitioner.

PETITION

FOR

REHEARING

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ALBERT W. STUBBS,
Empire Building
Columbus, Georgia 31902
Attorney for Petitioner

Of Counsel:
Howell Hollis
Hatcher, Stubbs, Land,
Hollis & Rothschild
Empire Building
Columbus, Georgia 31902

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Gas Light Company of Columbus, Petitioner, respectfully prays that this Court grant rehearing of its order of January 24, 1972, denying the petition for writ of certiorari, ___ U. S. ___, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit in the above case as prayed for in the petition filed June 16, 1971 herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

I.

Since this case was submitted to this Court on the petition for certiorari and the briefs of Petitioner and

Respondents, the United States District Court for the Northern District of California has issued a further decision in *Marnell v. United Parcel Service of America, Inc.* The later decision was filed October 28, 1971 and is reported at 1971 Trade Cases ¶73,761. That decision, as well as the earlier decision in the same case (260 F. Supp. 391) is directly contrary to the decision of the Fifth Circuit Court of Appeals in the instant case. Petitioner does not suggest that this conflict alone justifies the granting of certiorari. Considered, however, in context with the conflict in the decisions by five courts of appeals in four circuits which have been issued since 1970 alone (discussed at pages 11-14 of the petition for certiorari), the second *Marnell* decision, we submit, does demonstrate the continuing importance of the question involved[1] and of the conflict itself.

Marnell was a private antitrust action against a holding company and its subsidiary—a state regulated motor carrier—for damages for destroying competition

[1] If the opinion of the Circuit Court is allowed to stand, a major segment of one of the largest industry groups in the United States will be virtually free from the operation of the federal antitrust laws. The 1970 *Statistical Abstract of the United States*, prepared by the United States Department of Commerce, contains a tabulation (p. 475) of the total assets and annual receipts of active corporations in the United States as shown by federal income tax returns. This tabulation groups corporations into eight basic categories, one of which covers public utilities—"transportation, communication, electric, gas, sanitary service." Of these eight categories, only two—"manufacturing" and "finance, insurance, real estate"—have greater assets or annual receipts than utilities. This tabulation shows that as of 1967, utilities had assets in excess of 220 billion dollars and annual receipts in excess of 100 billion dollars. The states, almost without exception, have adopted schemes for the regulation of utilities. See, e.g., Welch, *Cases and Text on Public Utility Regulations* 579 (rev. ed., 1968). Hence the premise for a "state action" defense will be available in a substantial portion of antitrust actions filed against utilities.

and attempting and conspiring to monopolize the retail parcel delivery market in certain major cities in California. The defendants, among other things, filed a motion for a stay of the action pending the referral of certain issues to the California Public Utilities Commission. (260 F. Supp. at 396) In denying the motion, the court held that a determination by the state commission under the standards of the Public Utilities Code—whether the "rates and practices were just, reasonable and not unduly discriminatory" (260 F. Supp. at 414)—would be

> "neither useful nor determinative upon the issue of monopoly presented in this case, i.e., whether those rates—whether lawful or not, have been used, among other things, to monopolize a market. If so used the mere lawfulness or unlawfulness of the rates for transportation purposes as between defendants and the shipping public would be immaterial." (260 F. Supp. at 414)

This holding was based upon the following analysis of *Parker v. Brown*, 317 U. S. 341 (1943):

> "It is apparent that the regulatory scheme of the California Public Utilities Code is quite different from the regulatory scheme of the Prorate Act considered in Parker v. Brown, supra.
>
> "Although California's scheme of regulation for motor carriers emanates from the state as sovereign to carry out the declared purposes of the Public Utilities Code, the regulatory scheme is one of general supervision rather than one of specific direction.
>
> "Although the California Public Utilities Code requires and directs that motor carriers shall not operate without compliance with certain of its provisions (e. g., requiring an operating permit or

> certificate) and although it further provides and directs that motor carriers must affirmatively do other things (e. g., file rate schedules in the case of common carrier operations and refrain from charging less than the minimum rates fixed by the Commission), the Act does not otherwise affirmatively direct what the carriers' rates or contracts shall be—except that they shall be reasonable.
>
> ". . . .
>
> "Certainly, the California Public Utilities Code could not and has not directed defendants to create or attempt to create a monopoly in violation of the federal antitrust laws nor to do any of the acts charged in the complaint as having been done with the intent to create a monopoly." (260 F. Supp. at 409-10)

At the trial before the court without a jury, the motions to stay were renewed. The following is from the decision by Justice Clark (sitting by designation) in the second decision:

> "Thereafter motions to stay and for a certificate allowing an interlocutory appeal under 28 USC §1292(b) were also overruled. Judge Sweigert filed a learned and comprehensive opinion thereon. *Marnell v. United Parcel Service of America, Inc.* [1966 Trade Cases ¶71,913], 260 F. Supp. 391 (N. D. Cal. 1966). The motions have been renewed and they are each denied on the ruling of Judge Sweigert." (1971 Trade Cases at 91,208)

Since the regulatory scheme under the public utility laws of Georgia administered by the Georgia Public Service Commission is comparable in its essential features with the California Public Utilities Code, the direct conflict presented by the *Marnell* decisions is inescapable, and, we respectfully submit, inevitable unless this Court resolves the conflicts among the cir-

cuits. It is significant that at the time of the second *Marnell* decision, the Fifth Circuit's opinion in the instant case, as well as that of the Fourth Circuit in *Washington Gas Light Co. v. Virginia Electric and Power Co.*, 438 F. 2d 248 (1971), had been issued, and were available to the district court as precedent.

II.

Since this case was presented to this Court on the petition for certiorari and briefs of the parties, this Court, on January 13, 1972, issued its decision in *California Motor Transport Co. v. Trucking Unlimited*, ___ U. S. ___, 92 S. Ct. 609, in which it was held that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct violative of the antitrust laws. *California Transport* is an extension of views expressed by the Court in *Eastern Railroad Conference v. Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U. S. 657 (1965). The Court has stated that the conclusion reached in *Noerr* was a corollary of its decision in *Parker v. Brown, supra*. See *California Motor Transport Co. v. Trucking Unlimited, supra*, 92 S. Ct. 609, 614 at n. 3. The doctrines established by both lines of cases provide related and limited immunity from the federal antitrust laws. *Noerr* immunity permits the exercise of First Amendment rights, while the *Parker* immunity is presumably recognized to permit the implementation of valid governmental action. The reasoning of this Court in *California Transport* and its decision to remand for trial has a substantial effect upon the instant case, we submit, in view of the action of the Court of Appeals in affirming a summary judgment for

the defendants without comment upon the conspiracy issue.[3] In *California Transport*, this Court held that:

> "Petitioners [certain highway carriers], of course, have the right of access to the agencies and courts to be heard on applications sought by competitive highway carriers. That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the antitrust laws.
>
> "It is well-settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute." (92 S. Ct. at 613)

California Transport recognizes that concerted and continued use of First Amendment rights to violate the antitrust laws is not protected although any given exercise of such rights (in that case, efforts to prevent competing carriers from obtaining operating authority through administrative and judicial processes), when separately viewed, is protected. In the Court's words:

> "One claim, which a court or agency may think baseless, may go unnoticed; but a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused. That may be a difficult line to discern and draw. But once it is drawn, the case is established that abuse of those processes produced an illegal result viz. effectively barring respondents from access to the agencies and courts." (92 S. Ct. at 613)

---

[3] "[S]ummary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles. . . ." *Poller v. Columbia Broadcasting System*, 368 U. S. 464, 473 (1962); *Accord: Norfolk Monument Co. v. Woodlawn Memorial Gardens, Inc.*, 394 U. S. 700 (1969).

Similarly, a concerted and continued conspiracy to violate the antitrust laws should not find refuge in *Parker* because of episodic state agency approvals of particular antitrust violations undertaken pursuant to the conspiracy, although it may be assumed *arguendo* that approval by a state agency of a particular practice, when separately viewed, would find immunity under *Parker*.

In the instant case, Petitioner contends that Respondents engaged in various monopolistic anticompetitive practices and that they combined with each other and with additional co-conspirators to suppress or eliminate the competition from suppliers of natural gas including Petitioner, by various predatory means. (R. 33-34) The Court of Appeals held that certain piecemeal approvals of particular practices undertaken by Georgia Power Company, one of the Respondents, in furtherance of the conspiracy, provided immunity from the antitrust laws.[4]

This conclusion, we respectfully submit, is totally at odds with the reasoning of the Court in *California Transport*.

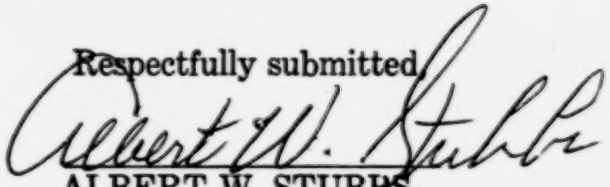
---

[4] Even where the application of the *Parker* doctrine has been found appropriate, it has been held that alleged governmental compulsion cannot furnish immunity if the activities were the result of a conspiracy rather than the governmental action. See *Wainwright v. National Dairy Products Corp.*, 304 F. Supp. 567, 574-75 (N. D. Ga. 1969).

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Fifth Circuit.

Respectfully submitted,



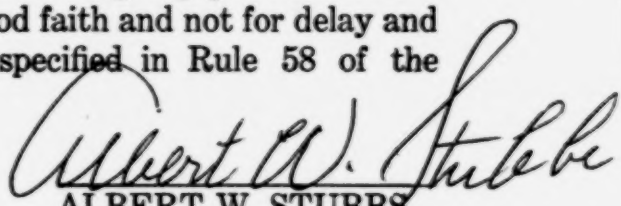
ALBERT W. STUBBS
Empire Building
Columbus, Georgia 31902
Attorney for Petitioner

Of Counsel:

Howell Hollis
Hatcher, Stubbs, Land,
Hollis & Rothschild
Empire Building
Columbus, Georgia 31902

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.



ALBERT W. STUBBS
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, ALBERT W. STUBBS, an attorney of record for Gas Light Company of Columbus, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served copies of the foregoing Petition for Rehearing of Order Denying Petition for Writ of Certiorari on each of the other parties hereto by depositing three copies of the same in a United States Mail Box with Air Mail postage prepaid, addressed to the respective counsel of record for such parties at their post office addresses, as follows:

Allen E. Lockerman
James E. Joiner
Troutman, Sanders, Lockerman and Ashmore
3500 First National Bank Tower
Atlanta, Georgia 30303

S. E. Kelly, Jr.
Kelly, Champion & Henson
310 Columbus Bank & Trust Company Building
Columbus, Georgia 31902

Attorneys for Respondent, Georgia Power Company

Terence H. Benbow
Arnold S. Anderson
Steven A. Berger
Winthrop, Stimson, Putnam & Roberts
40 Wall Street
New York, New York 10005

William G. Scrantom, Jr.
Swift, Page, Henkel & Chapman, P. C.
P. O. Box 1199
Columbus, Georgia 31902

Attorneys for Respondent, The Southern Company

This February 17, 1972.

Albert W. Stubbs

ALBERT W. STUBBS
Attorney for Petitioner,
Gas Light Company of Columbus